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MERGER OF ESTATES.

Merger is peculiarly a legal doctrine; its rules and the circumstances essential to its application at law, must be held in view in any discussion of the manner in which equity deals with the subject when, in its jurisdiction, the question whether or not merger will occur, arises.

The object of the doctrine of merger is to accelerate the possession, or, at least, the estate in which the drowning takes place.

*The reason of merger is,*¹ that when the circumstances concur upon which merger may be based, the estates are inconsistent; it would be absurd to allow one person to have two distinct estates, immediately expectant on each other, while one of them includes the time of both. *Nemo potest esse dominus et tenens.* It would be absurd for the law to admit that the same person had two distinct estates, when the time of one was, in construction of law, equal to and involved in the time of the other.

Another authority explains its reason to be, that as all inferior estates and interests in land are derived out of the fee-simple, therefore, whenever a particular estate or limited interest in land vests in him who has the fee-simple of the same land, such particular estate or limited interest is immediately drowned in the fee, upon the principle *omne majus continet in se minus.*²

The governing principle of merger at law, is not the intention of the parties; for while in some instances the doctrine, from favor to the intention of the parties, is held inapplicable, yet in others, merger is consequent upon the union of two estates, in direct opposition to the intention of the parties, either expressed or implied.³

Merger is distinguished from *Suspension*, from *Extinguishment*, and from *Surrender*.

¹ Mayhew, *The Law of Merger*, 2; 4 Kent's Com. 99.

² Cruise's Digest, Vol. I., 70.

³ Mayhew, 62; Cruise's Dig., Vol. VI., 487.

Suspension is defined as a partial absorption, occasioned by the temporary union of two estates or interests.

Extinguishment is the annihilation of a collateral right or interest in the subject out of which it is derived; as when a rent charge in fee and the fee itself become vested in the same person; or as a confusion of rights, as when a debtor becomes the owner of his debt.

As distinguished from surrender, merger is merely the consequence of a rule of law; the estate must be transferred and have continuance in the transferee before the rule of law can come into effect; while the annihilation produced by surrender is identical with and immediately caused by the surrender itself. The effect of both are the same, but the modes of their operation differ.¹

To be subject to merger, the two estates must be the two vested estates which are to take effect immediately after each other—subject to the qualification, however, that if the two estates are of freehold tenure, an intermediate estate for years will not prevent the merger.² As a rule it is absolutely necessary that the latter estate should be connected with the former estate, and be immediately expectant thereon, so as to come into its place on the determination of that estate.

There must also be a privity of right and title between the estates; the several successive estates must relate to the same share. For instance, if A and B are tenants in common in fee, and A settles his moiety on C for life, and the reversion of B descends to C, the estates of C will remain distinct. For these estates exist in an equal share in the same lands, but they clearly exist in different shares. As between the two estates there is not any privity or connection in title; no dependence of one estate on the other. The estate for the life of C is derived from the title of A, while the reversion in fee is derived under the title of B. It is therefore impossible for one estate to blend with the other. There is a want of that privity of right and title essential to merger.³

Equal estates of freehold, the one in possession, the other in *re-mainder*, will not merge, although they may meet in the same person;⁴ and it has been laid down as an authoritatively established rule, that there can be no merger between equal estates of freehold, whether the

¹ Mayhew, 7.

² *Bate's Case*, 1 Salk. 254.

³ *Church v. Edwards*, 2 Bro. C. C. 180; Mayhew, 75; Preston, *Conveyancing*, Vol. III., 90; See also 1 Russ. 200.

⁴ Mayhew, 49; Cruise's Dig. VI., 477.

estate in which the merger is proposed be in remainder or in reversion to the estate to be drowned.¹

An estate for the life of another will merge in an estate for the tenant's own life;² yet this is no exception to the rule just given, for the reason of it is that an estate *pur autre vie* is, as to the tenant himself, accounted by the law to be of less extent and importance than an estate for his own life.³

It follows, that in the application of the doctrine of merger, *numerical values are not considered*.

Estates for years may merge in each other, when the term in which the merger is to occur is by way of *reversion* to the term in possession; thus, in the case of *Stephens v. Bridges*, Madd. & Geld. (Eng.) 66, a term of 1000 years in possession was held to merge in a term of 500 years in reversion; and so a term of fifty years in possession will merge in a term of only twenty years in reversion, so that the tenant will have only the time of the reversionary term; the reason being that it is absurd that the relations *dominus et tenens* should meet in the same person; and it is all one if the estate in reversion be for a greater number of years or not.⁴

But if the second term be by way of *remainder*, both estates are equal; they may co-exist in the same person, in the same right, as continuing interests, because the incompatible relations of *dominus et tenens* not meeting in the same person do not call for the absorption of the one in the other.⁵

Thus it appears that a valid distinction is taken between estates in remainder and estates in reversion; and a further illustration is afforded of the rule that relative rank, and not numerical value, is regarded in the application of the doctrine of merger.

The more remote estate must be as large as, or larger than, the more immediate estate. If a lease be made to one for years, and a further limitation by way of remainder to the same person for life, the estate for years will merge in the estate for life. If a man takes a lease for a term of years, and afterwards takes an interest for term of life, to take effect immediately, the lease for years is extinct. But where one leases to A for life and twenty years over, there A shall have both

¹ Bissett on Estates for Life, 181.

² *Lewis Boules' Case*, 11 Rep. 83.

³ Mayhew, 52.

⁴ Mayhew, 100.

⁵ Cruise's Dig. VI., 478, 72; Mayhew, 105; See Preston, Conveyancing, Vol. III., 201.

estates; and if a man leases to another for life, remainder to him for twenty-one years, he has both estates in him distinct, and may grant away either of them; for a greater estate may uphold a lesser, but not *e converso*; and this term is a more remote estate, and an estate for life is larger than an estate for years.¹

It is unnecessary here to discuss the question of merger when the estates are held in different rights; or the doctrine of merger as applied to entailed estates.

Mr. Preston² makes the following summary of the rules applicable to merger, and of the circumstances essential to the application of the doctrine:

"*First*: Two or more estates must meet in the same person, in the same lands, or in the same part of the same lands.

"*Second*: The more remote estate must be the next vested estate in remainder or reversion, without any intervening vested estate, and also without any intervening interest by way of contingent remainder, created in the same instant of time, or by the same act which gives origin to the other estates.

"*Third*: The estate in reversion or remainder must be as large as, or larger than, the preceding estate.

"*Fourth*: The several estates must be held in the same legal right, or when the estates are held in different legal rights, one of them must not be an accession to the other merely by act of the law.

"*Fifth*: The estates must not be privileged under the Statute of Uses or the Statute of Entails.

"*Sixth*: The doctrine will not have the effect to alter the quality of one of two estates in the same person, or to destroy a contingent remainder,³ when the several estates are limited by the same instrument or deed, or take their effect in the same instant of time, and in some degree by the same act, and some other person is concerned in the consequence of the merger.

"*Seventh*: The doctrine does not apply to an estate for several lives arising under the same limitation as giving one entire and undivided time of continuance.

"*Eighth*: The union of two estates in the same person by means of the joint act of the respective owners of these estates, with an intention that the estate of their assignee shall continue for the collective time of their several estates, will not be a cause of merger."

Whenever the legal and equitable estates in the same lands meet in the same person, in the same right, and are co-extensive and commensurate, there merger will ensue.

For the reason, according to some authorities,⁴ that the law regards a legal estate as superior in rank to an equitable estate, and therefore,

¹ Mayhew, 79.

² Preston, Conv. III., 50.

³ Cf. Code of Va. 1887, sec. 2425.

⁴ Pomeroy's Eq. Jur., sec. 787.

the reason of merger being present, the ordinary rules of merger apply. According to other authorities,¹ and probably with more show of reason, it is because by such a union a confusion of rights is produced, and *extinguishment* follows; for no man can be trustee for himself; no man may have a subpoena against himself.

There is some conflict among the text-writers as to whether or not the equitable estate must be commensurate and co-extensive with the legal estate; Mr. Pomeroy saying,² that when a legal and a less equitable estate meet in the same person, merger follows; to the same effect is Perry on Trusts (sec. 347), though no citation of authorities in his support is made by him. Yet the authorities cited by Pomeroy,³ expressly declare that the two estates must be co-extensive and commensurate. To the same effect are the authorities cited below.⁴

In no instance can the legal merge in the equitable estate.

The effect of merger upon the estate merged is, as above stated, annihilation; yet persons having interests affecting it will be left in the same condition, in point of benefit, as if no merger had occurred.⁵

The effect of merger upon the estate in which the drowning occurs, is to subject the reversion or remainder thus accelerated to all those burdens and consequences which would have attached if the prior estate had not existed, and in the same order or series of time as if that estate were determined; thus, the possession will be chargeable, during the period appointed for the continuance of the drowned estate, with all the encumbrances which affected that estate, and also, by way of acceleration, with the encumbrances upon the estate accelerated.⁶ The case of *Browne v. Bockover*, 84 Va. 424, is an illustration of this principle, although decided without reference to the rule given.

In Equity the question of whether or not merger will occur, arises in the case of legal estates, and of equitable and legal estates, in the same lands, meeting.

No question can arise of merger between equitable estates, for an equitable estate—and this comprehends equitable encumbrances—can not merge in an equitable estate. “The equitable estate is a mere creature of the court, and subsists in idea only, as to any legal consequences

¹ Mayhew, 9; Fonblanque's Eq. II., 163; *Brydges v. Brydges*, 3 Ves. jun. 125.

² Pomeroy's Eq. Jur., sec. 787.

³ *Selby v. Alston*, 3 Ves. jun. 339; *Brydges v. Brydges*, *supra*.

⁴ *Merest v. James*, 6 Mad. 119; *Williams v. Owens*, 2 Ves. jun. 595; *Wykham v. Wykham*, 18 Ves. jun. 418; *Knight v. Frampton*, 4 Beav. 10; Mayhew, 9, and cases cited there; Perry on Trusts, sec. 13.

⁵ *Archer's Case*, 1 Rep. (Eng.), 66; *Podger's Case*, 9 Rep. 107.

⁶ Mayhew 66.

that might result from the possession of it, but totally distinct from the legal estate.”¹ An equitable estate is a right, complete in itself; entirely separate from the legal estate; and of any number of trusts, declared (or implied) upon any property, each trust, or equitable estate, is in reality a right—an entire estate—perfect and complete in itself.

With reference to its rank or quality, each equitable estate is co-ordinate with every other equitable estate based upon the same legal fee, each being perfect and complete in itself, and enforceable in the same manner, *i. e.*, by the aid of a court of equity; and equitable estates measure their difference one with another, not by rank or quality, as do legal estates, but by numerical value. Since merger, a legal doctrine, is based not on numerically differing values, but on the different rank or quality of estates; since the reason of merger—that one estate is greater than, or contains the time of the other, or that the incompatible relations of lord and tenant, or trustee and *cestui que trust*, meeting in the same person at the same time—must be present, or merger would be an absurdity; since, in order for the doctrine of merger to be applicable, the two estates, of which one is to drown the other, must be carved out of and a part of the same fee-simple estate; and since (see p. 654, *supra*) there must be a privity of right and title between the estates, it necessarily follows that in the case of two or more equitable estates, which are co-ordinate in rank, each being in itself a complete and perfect estate; of which one is not a part of, nor has its time comprehended by the time of the other; which have no privity of right or title between themselves; in the meeting of which no confusion of rights such as to afford a reason of merger is produced; merger cannot occur so as to drown one in the other.²

¹ *Brydges v. Brydges*, 3 Ves. jun. 126 (*Philips v. Brydges*.)

² In the case of *Allen v. Patrick* (5 Va. Law Reg. 523; 1 Va. S. C. R., 561), recently decided, the court seems to say that merger is possible between equitable estates or encumbrances, although the legal title—as in that case—be outstanding. So far as the writer can ascertain, this marks a radical change in the doctrine of merger. But with all deference to the court, I suggest that a mistake has been made in that opinion in ascribing to Pomeroy the following citation, used as an authority upon which to base the ruling of the court: “Where ‘the owner of an estate becomes also the owner of an encumbrance on it, such encumbrance shall thereby become extinguished,’ says the law; provided, however, says equity, ‘that it is not his interest or intention to keep such encumbrance alive.’ 2 Pom. Eq. Juris., sec. 790.” 2 Pom. Eq. Juris., sec. 790, reads as follows: “When the owner of the fee becomes absolutely entitled in his own right to a charge or encumbrance upon the same land, with no intervening interest or lien, the charge will, at law, merge in the ownership and cease to exist. Under like circumstances a merger will take place in equity, where no intention to prevent it has been expressed, and none is implied from the circumstances

But this reasoning has no application in the case of encumbrances of such nature that when they meet, the "hand to pay becomes the hand to receive"—where extinguishment is of course.

"The applications of the equitable doctrine concerning merger," says Pomeroy,¹ "are various in form, although resting upon the same general principle. . . . This single principle, from which the doctrine, in all its modes and forms of application, directly results, is the fruitful maxim, that equity looks at the real intent of the parties as constituting the essential substance, and not at the mere external form. In this method of viewing the affairs of mankind, equity often establishes different rules, creating different rights and duties from those which, under the same circumstances, prevail at law. The equitable doctrine of merger is a striking illustration of this most righteous principle; and the whole discussion, in fact, consists in ascertaining when and how a merger, which would have been inevitable at law, will be prevented or not permitted in equity."

Equity does not favor merger in any case; and will not suffer the destruction of a trust by the application of the doctrine;² it is not, like some other doctrines of the law, adopted by analogy to the law; it is, in fact, foreign to equity, and is never applied by that court as its own doctrine.

Before there can be any application of the doctrine by a court of equity, the foundation for merger—that is, the meeting of legal estates in such manner as to produce merger, at law, or the meeting of a legal and an equitable estate in the same lands—must exist; given such a foundation, the court will be guided by the intention of the parties, expressed or implied.³

In case of the meeting of a legal estate with a co-extensive and commensurate equitable estate, in the absence of any expression of intention, merger is *prima facie* the result.⁴ On the other hand, when the owner of a legal estate becomes the owner of a lesser equitable estate, under such circumstances that at law merger would follow,

and the interests of the party." Through some oversight the language of some other author has been credited to Pomeroy. That author, in his discussion of merger, does sometimes use the word "owner" without the qualification "legal," or "of the fee," as for instance at the head of page 1097 of his second volume; but by reference to the context, or to the authorities cited by him, it can readily be seen that such a qualification is always to be understood in that connection.

¹ Pomeroy, Eq. Jur., sec. 786.

² Mayhew, 23.

³ *Forbes v. Moffatt*, 18 Ves. jun. 384; *Lord Crompton v. Ozenden*, 2 Ves. jun. 263.

⁴ *Wade v. Paget*, 1 Brown's C. C., 363; Mayhew, 9; Pomeroy, sec. 788.

merger does not, in equity, *prima facie* result, in the absence of an intention, expressed or implied, that it shall. Likewise, when a less equitable estate meets with the fee. In fact, when this occurs, it appears doubtful, as stated above, whether merger at law can take place. Sir Rd. Pepper Arden, M. R., in *Brydges v. Brydges*, 3 Ves. jun., 125, says:

"Another position was maintained, in a latitude that would create infinite confusion: that where there is in the same person a legal and an equitable interest, the former absorbs the latter. I admit that where he has the same interest in both, he ceases to have the equitable estate, and has the legal estate; upon which this court will not act, but leaves it to the rules of law. But it must be understood always with this restriction: that it holds only where the legal and equitable estates are co-extensive and commensurate; but I do not by any means admit, that where he has the whole legal estate and a partial equitable estate, the latter sinks into the former; for it would be a disadvantage to him. All this depends upon the misuse of words."

In the absence of all facts from which the intention of the party can be gathered, the court will be guided by what it considers to be to his interest and advantage.¹

Whenever the legal owner of land becomes the owner of a charge resting upon the land, the charge merges in the legal estate, in the same manner as does an equitable estate in the fee, and for the same reason, viz: that no man can be trustee for himself. But the equitable doctrine preventing merger is even stronger in this case than in the case of the meeting of two estates. And although the rules of equity differently affect tenants in fee, tenants for life, and tenants in tail, in the merger of charges, it is, nevertheless, in each case, still a question of intention.²

Two principal conditions of fact are to be considered: first, where the legal owner of the property becomes, by bequest, devolution, or transfer, holder of the charge; second, where the owner of the property voluntarily pays off the charge.

First: If there be no intervening interest or lien, in the absence of an expressed intention to the contrary, or one to be implied from the circumstances and interests of the party, merger will *prima facie* result; this, however, is in most instances a mere presumption which may be overcome, and sometimes does not arise.³

In the case of a tenant for life, a presumption against merger exists.

¹ *Forbes v. Moffatt*, 18 Ves. jun. 392.

² *Forbes v. Moffatt*, 18 Ves. jun. 391.

³ *Pomeroy*, Eq. Jur., sec. 789.

If an interest, lien or encumbrance intervenes between the legal estate and the encumbrance thought to be affected by merger, that doctrine, subject to one exception, will not be applied. The exception is where the owner of the encumbrance is himself the primary and principal debtor. In *Millspaugh v. McBride*,¹ Chancellor Walworth, in a case involving these circumstances, said: "It was, in equity, impossible for the prior mortgage, or the equitable interest of the defendants therein, to unite with their legal title to the equity of redemption, by reason of the intermediate equity which the complainant had by virtue of his mortgage. The establishment of a different principle would bring us back to the doctrine of tacking; or a merger which would cut off the complainant's mortgage altogether. If the mortgagee is considered as holding the legal estate, and the mortgagor the mere equity, the effect of a merger would be to unite to their prior mortgage the equity of redemption purchased by these defendants, so as to overreach the junior encumbrancer altogether, at law, and leave him to his remedy in equity only. And when he comes here to ask equity, he must do equity by paying off the first encumbrance."²

In *Toulmin v. Steere* (1807), 3 Mer. 210, 224, Sir Wm. Grant, M. R., said: "The cases of *Greswold v. Marsham*, 2 Ch. Cas. 170, and *Mocatta v. Murgatroyd*, 1 P. Wms. 393, are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, and consequently, a mortgage which he has got in, against a subsequent incumbrance of which he had notice." But in 1877, in *Adams v. Angell*,³ the rule quoted was declared to be merely *obiter dictum*, the Master of the Rolls saying: "If there is no reason for keeping it (the encumbrance) alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another encumbrance, equity will not destroy it." And since this decision, *Toulmin v. Steere* is no longer considered an authority, and is regarded as completely overthrown.

When the owner of the encumbrance is himself the primary debtor, and absolutely bound for its payment, the presumption is that the encumbrance is merged.⁴ But under certain circumstances when it is for innocent purposes, it will be kept alive.⁵

¹ 7 Paige's Chy. 509; 34 Am. Dec. 360.

² *McKinstry v. Mervin*, 3 Johns. Ch. 446; *Crow v. Tynsley*, 6 Dana, 402.

³ L. R. S. Ch. Div. 641, *et seq.*; 22 Eng. Rep. 369, *et seq.*

⁴ *Pomeroy*, Eq. Jur., secs. 790, 793, 794.

⁵ *Rorer v. Ferguson*, 96 Va. 411.

Second: When the owner in fee pays off a charge: Under these circumstances the question is whether it is possible, in any manner, or by any form of proceeding, for the party thus paying off a charge to keep it alive; whether or not when so doing he takes an assignment of the charge, often being immaterial.¹ If merger can be prevented when the owner of the land pays off the charge, the question depends upon intention, subject to the rules heretofore stated.

When the owner of the land is *not* primarily and personally bound for the debt, he may keep it alive, if there is such an intention expressed or implied. And the interests and advantage of the party owning the land are mainly considered in the determination of this question. This may be without even a formal assignment of the lien. Such persons are, for instance, grantees of the mortgagor who have not assumed payment of the mortgage, heirs, devisees, and in fact all persons entitled to redeem and not personally liable as principal debtors.²

If a tenant for life pays off a charge upon land in which he has such life estate, he is presumed to do it for his own benefit, and the charge is kept alive; the simple payment, without more, being sufficient for this purpose.³ And so with tenants for years and tenants in common.

The whole question may be summarized by saying that in equity, in order for the doctrine of merger to be applied, there must first be two or more legal estates in the same land, in the same party, in the same right, at the same time, one being immediately expectant upon and larger than the others or other, and without any intervening interest; or there must be a legal estate and an equitable estate arising out of the same property, in the hands of the same person, in the same right, and at the same time; and by equitable estate as here used, I mean to include equitable rights, charges and encumbrances. Given this foundation for merger, a court of equity will apply the doctrine, or prevent its application, according to the intention, expressed or implied, the interest and the advantage of the owner of the estates, always in such manner that no fraud upon others will be perpetrated or aided; the presumption for or against merger in every case being substantially as has been briefly stated above.

But unless the requisite foundation for merger exists, equity will not supply it, and no application of the doctrine of merger is possible.⁵

Staunton, Va.

J. M. PERRY.

¹ Pomeroy, Eq. Jur., sec. 796.

² Id., sec. 797, and cases cited.

³ Id., sec. 798, Jones, Mortgages, sec. 864, 865.

⁴ Harman v. Forster, 1 Dr. & Wal. 637; Cruise's Dig. I., 50.

⁵ Garland v. Pamplin, 32 Gratt. 305; Little v. Bowen, 76 Va. 724; Hospes v. Almstedt, 83 Mo. 473.